(2)

Supreme Court, U.S.
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No. 04-407

In The

Supreme Court of the United States

BARKER SANITATION,

Petitioner,

v.

CITY OF NEBRASKA CITY, NEBRASKA and WASTE CONNECTIONS OF NEBRASKA, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENT, WASTE CONNECTIONS OF NEBRASKA, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals properly affirmed the District Court's holding that Nebraska City Ordinance 2505-2000 did not violate the Dormant Commerce Clause.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Barker Sanitation was the plaintiff/appellant in the court below. Respondent City of Nebraska City, Nebraska was the defendant/appellee in the court below. Respondent Waste Connections of Nebraska, Inc. was the intervenor defendant/appellee in the court below.

Waste Connections of Nebraska, Inc. is a wholly-owned subsidiary of Waste Connections, Inc. Waste Connections, Inc. is traded publicly on the New York Stock Exchange with the symbol "WCN".

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OPINIONS BELOW

The Opinion of the Eighth Circuit is unreported and reproduced in the Petitioner's Appendix at 1a. The Opinion of the District Court for the District of Nebraska is unreported and reproduced in the Petitioner's Appendix at 4a.

JURISDICTION

The Judgment of the Eighth Circuit was entered on June 25, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. THE DISTRICT COURT PROCEEDINGS.

Barker Sanitation, LLC (hereinafter "Barker Sanitation") filed suit against the City of Nebraska City alleging that the City's Ordinance 2502-2000 violated the dormant provisions of the Commerce Clause, Article I, § 8, Clause 3 of the United States Constitution and caused a taking of Barker Sanitation's property rights in violation of the Fifth Amendment to the United States Constitution and Article I, § 21 of the Nebraska Constitution. Ordinance 2505 incorporated a Franchise Agreement between the City of Nebraska City and Waste Connections of Nebraska, Inc., a Delaware corporation (hereinafter "Waste Connections"). Waste Connections intervened in the litigation aligned as a Defendant.

On July 8, 2003, the United States District Court for the District of Nebraska, the Honorable Richard G. Kopf

entered a Memorandum and Order dismissing Barker Sanitation's takings claim under the United States Constitution and the Nebraska Constitution for lack of standing. The Memorandum and Order also dismissed Barker Sanitation's claim that Nebraska City's decision to award the exclusive franchise to Waste Connections was a violation of the dormant Commerce Clause. The District Court allowed the case to proceed solely on the issue of whether the Franchise Agreement violated the dormant Commerce Clause.

The matter was tried in a one-day trial to the bench on July 25, 2003. On November 4, 2003, the District Court in its Findings of Fact and Conclusions of Law dismissed Barker's Sanitation's Complaint finding that the Ordinance was not discriminatory on its face, in its purpose or in its effects, and thus did not violate the dormant provisions of the Commerce Clause. Pet. App. at 4a-32a. The District Court also found that the Ordinance's burden on interstate commerce was incidental and outweighed by its local benefits. Pet. App. at 4a-32a. A timely appeal followed the entering of the Court's Judgment in accordance with its Findings of Fact and Conclusions of Law.

2. THE EIGHTH CIRCUIT COURT OF APPEALS REVIEW.

The Eighth Circuit Opinion was issued only eight days after oral argument. Pet. App. at 1a-3a. The Eighth Circuit rejected Barker Sanitation's contention that the ordinance discriminates against interstate commerce through its purpose of economic protectionism and through its effect of preventing out-of-state companies from being able to compete with the processing of solid waste in the city. Pet. App. at 3a. The Eighth Circuit also

rejected Barker Sanitation's assertion that the District Court, "[E]rroneously found the ordinance had numerous local benefits, but only incidentally burdened interstate commerce." *Id.* The Eighth Circuit affirmed the District Court's analysis without extended discussion. Pet. App. at 3a. *See*, 8th Cir. R. 47B.

3. MISSTATEMENTS IN PETITIONER'S WRIT OF CERTIORARI.

The Petitioner misstates the clear findings of the District Court as affirmed by the Eighth Circuit. Specifically, Barker Sanitation states, "The District Court found that Nebraska City Ordinance 2505-2000 was admittedly an economic motive." Petitioner's Writ at 8.

The District Court actually held, "The evidence in this case establishes that several other local interests were discussed by the City Council for Nebraska City and the Nebraska City Area Solid Waste Agency before enacting the Ordinance at issue and before entering into the Franchise Agreement with Waste Connections . . ." Petitioner's App. at 28a. The District Court then set forth a list of those local interests. The District Court went on to find that it is, "[D]ifficult to detect what burden on interstate commerce is imposed by the Ordinance . . ." Petitioner's App. at 30a.

The District Court concluded, "In light of the numerous local benefits that would be achieved by Nebraska City's Ordinance (and the Franchise Agreement and Lease entered into pursuant to the Ordinance) and the incidental burden that the Ordinance and associated agreements impose upon interstate commerce, I must conclude that the defendant has not violated the dormant Commerce Clause

in enacting the exclusive franchise ordinance under *Pike*." Petitioner's App. at 31a.

REASONS FOR DENYING THE WRIT

I. BARKER SANITATION LACKS STANDING TO PETITION THE COURT FOR CERTIORARI.

Barker Sanitation lacks standing to petition the court for certiorari. A function of the standing doctrine is to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 191 (2000). The party invoking the federal jurisdiction bears the burden of establishing case-or-controversy standing requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Constitution requires a party to satisfy three elements before it has standing to bring a suit in federal court: injury in fact, causation, and redressability. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 102-103 (1998). This triad of injury in fact, causation and redressability comprises the core of Article Three's case-or-controversy requirement. The party invoking federal jurisdiction bears a burden of establishing its existence. *Id.* at 103-104. In *Steel Co.*, this Court defined redressability as, "[A] likelihood that the requested relief will redress the alleged injury." *Id.* at 103. Relief that does not remedy the injury suffered cannot bootstrap a plaintiff in the federal court; that is the very essence of the redressability requirement. *Id.* at 107.

Barker Sanitation's Petition for Writ of Certiorari fails the redressability prong of the standing test because

Barker Sanitation went out of business after the Eighth Circuit Opinion was issued, according to a letter sent to its customers. Reproduced in Respondent's Appendix is a letter from Barker Sanitation, LLC to "Dear Customer." The letter, in relevant part, states:

> We regret to inform you that as of September 1, 2004, we will no longer be providing residential and commercial sanitation services. We will be dissolving our company due to the fact that we are unable to find dependable employees, plus we have over five thousand dollars on our books of people whom have received service as long as two years ago and are yet to pay for the service we provided. Resp. App. 1a.

Barker Sanitation, LLC, has been dissolved and is out of business. No relief granted by this Court will remedy Barker's alleged injury. Barker Sanitation has simply failed to show that it has standing to pursue its Petition for Writ of Certiorari. The Writ must be denied.

II. THERE IS NO CONFLICT BETWEEN RELEVANT DECISIONS OF THIS COURT AND THE *BARKER SANITATION* DECISION.

Supreme Court Rule No. 10, in relevant part, states:

> A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> * * *
>
> (c) a state court or United States court of appeals has decided an important question of

> federal law that has not been, but should be, settled by this Court, or has decided an important federal question in the way that conflicts with relevant decisions of this Court.

Barker Sanitation posits its review by this Court on the basis that the District Court and Eighth Circuit opinions in *Barker Sanitation* conflict with *C.A. Carbone, Inc. v. Town of Clarkstone*, 511 U.S. 383 (1994) and other decisions of this Court. However, the *Barker Sanitation* decision is not an "important federal question" that conflicts with this Court's existing precedent. Both the District Court and the Eighth Circuit summarily rejected Barker Sanitation's argument concerning *Carbone* and other Commerce Clause cases decided by this Court.

First, the District Court, as affirmed by the Eighth Circuit, found that there is no language in Ordinance 2505-2000 that facially discriminates against interstate commerce. Pet. App. at 22a.

Second, the District Court, as affirmed by the Eighth Circuit, found that Ordinance 2505-2000 does not have a discriminatory effect against out-of-state interests. Importantly, Barker Sanitation fails to recognize this important holding of the District Court, "The evidence establishes that the Ordinance, Franchise Agreement, and Lease do not require that Waste Connections – the winner of the exclusive franchise bid – or any self-hauler to deliver waste collected in Nebraska City to the Transfer Station or to any other designated facility, in-state or out-of-state." Pet. App. at 23a. This holding clearly and unequivocally distinguishes the *Barker Sanitation* case from *Carbone*. The factual basis of this Court's decision in *Carbone*, as Barker Sanitation's Writ recognizes, was that the Town of Clarkston had "adopted a flow control ordinance which

required all nonhazardous solid waste within the town to be deposited at the transfer station." Pet. Writ at 7. Here, the District Court, as affirmed by the Eighth Circuit, found the exact opposite – the Ordinance does not require waste to be deposited at the transfer station. The factual distinction between these two schemes shows that the *Barker Sanitation* decisions do not deviate from this Court's decision in *Carbone*.

Further, Barker Sanitation can point to no discriminatory effect on the interstate market. The District Court cited this Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128 (1978) that, "[T]he [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." Pet. App. at 24a. With respect to discriminatory effect, the District Court and Eighth Circuit decisions were carefully guided by this Court's precedent.

Third, the District Court, as affirmed by the Eighth Circuit, found that the Ordinance was not adopted for a discriminatory purpose. Specifically citing *Carbone*, the District Court held, "There is no evidence that the purpose behind the Ordinance and associated Franchise Agreement and Lease were to hinder the export of in-state waste into other states or to prevent out-of-state waste processors or haulers from doing business in Nebraska." Pet. App. at 26a.

The District Court ended its Commerce Clause analysis by relying on this Court's long-established balancing test as set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Applying the *Pike* balancing test, the District Court, as affirmed by the Eighth Circuit, concluded that

Nebraska City did not violate the dormant Commerce Clause enacting the exclusive franchise ordinance under *Pike*.

Clearly, the District Court, as affirmed by the Eighth Circuit, relied upon this Court's existing precedent in *Carbone*, *Exxon Corp.* and *Pike* in rendering its decisions. Thus, there is no conflict between the decisions in *Barker Sanitation* and any relevant decisions of this Court.

III. CERTIORARI WILL NOT BE GRANTED TO REWEIGH THE EVIDENCE AT TRIAL.

The last three reasons cited by Barker Sanitation for granting the Petition are merely asking this Court to review the evidence heard by the District Court and affirmed by the Eighth Circuit. In *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938), this Court held, with respect to its certiorari granting authority, that, "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. Moreover, the decision . . . rests on concurrent findings. They are not to be disturbed unless plainly without support." *Id.* at 178. (Internal citations omitted.)

Here, the evidentiary inferences which Barker Sanitation is asking this Court to review are based on concurrent findings of the District Court and the Eighth Circuit. The Supreme Court is not the place to review a conflict of evidence nor to reverse a Court of Appeals because this Court, in its place, may "[H]ave found the record tilting one way rather than the other, though fair-minded judges could find it tilting either way." *National Labor Relations Board v. Pittsburgh Steamship Co.*, 304 U.S. 498, 503 (1951).

The gravamen of Petitioner's Writ of Certiorari is that the District Court, as affirmed by the Eighth Circuit, accepted the wrong inferences from the factual findings. As existing precedent has clearly established, this is not appropriate grounds for review through certiorari.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dear Customer:

We regret to inform you that as of September 1, 2004 we will no longer be providing residential and commercial sanitation services. We will be dissolving our company due to the fact that we are unable to find dependable employees, plus we have over five thousand dollars on our books of people whom have received service as long as two years ago and are yet to pay for the service we provided.

This was a decision we did not want to make, due to all the work it took to get this company started. Our goal was to provide good service for a very low rate compared to the competitors. I feel this goal was met while I, Michael Barker, was able to run the routes myself. But to keep our prices low, I was forced to take a 2nd job to make ends meet and to keep the business going. I thought I could depend on the people I hired to run things while I wasn't available, but was unaware of some of the things they were doing until recently. We apologize for the non-dependable service you may have received the past few months. This has caused a lot of stress for me and my wife, and we feel we are not able to continue to run the business the way it should be.

We appreciate all of the valued customers who stuck with us through all of this, but we can find no other way to make it work at this time.

Thank you for giving us a fair chance as a small and local company. We apologize for any inconvenience this may cause you. Any comments or concerns please feel free to write to the address above.

Thanks again and God Bless.

Sincerely,
Michael and Amy Barker
Barker Sanitation LLC